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7 UNITED STATES DISTRICT COURT  
8 CENTRAL DISTRICT OF CALIFORNIA  
9 WESTERN DIVISION  
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11 SABAT SEMAAN, ) No. CV 06-03308-VBK  
12 )  
13 Plaintiff, ) MEMORANDUM OPINION  
14 ) AND ORDER  
15 v. )  
16 ) (Social Security Case)  
17 JO ANNE B. BARNHART, )  
18 Commissioner of Social )  
19 Security, )  
20 )  
21 Defendant. )  
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18 This matter is before the Court for review of the decision by the  
19 Commissioner of Social Security denying Plaintiff's application for  
20 disability benefits. Pursuant to 28 U.S.C. §636(c), the parties have  
21 consented that the case may be handled by the Magistrate Judge. The  
22 action arises under 42 U.S.C. §405(g), which authorizes the Court to  
23 enter judgment upon the pleadings and certified Administrative Record  
24 ("AR") before the Commissioner. The parties have filed the Joint  
25 Stipulation ("JS"), and the Commissioner has filed the certified AR.  
26 After reviewing the matter, the Court concludes that the decision of  
27 the Commissioner must be reversed and the matter remanded for further  
28 hearing.

1 Plaintiff asserts that the Administrative Law Judge ("ALJ") did  
2 not give proper consideration to the opinions of examining physicians.  
3 The Court agrees.

4 Plaintiff provides a lengthy and helpful discussion of the  
5 opinions of three physicians: Dr. Kriegsman; Dr. Donahue; and Dr.  
6 Fedder. (Joint Stipulation ["JS"] at 5-8.)<sup>1</sup>

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8 **A. ALJ Decision.**

9 Most pertinent to the ALJ's decision is his determination of  
10 Plaintiff's residual functional capacity ("RFC"), comprising an  
11 ability to do light work, with postural limitations of occasional  
12 stooping, kneeling, crouching, crawling, reaching overhead with her  
13 right arm, and a limitation to sitting/standing for four hours in an  
14 eight-hour work day. (AR 25.)

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16 **1. Dr. Kriegsman:**

17 Dr. Kriegsman initially evaluated Plaintiff on September 27,  
18 1993, and then wrote a report on October 20, 1993. (AR 257-262.) He  
19 treated Plaintiff until November 29, 1994. (AR 222-256.) In 1995, he  
20 made recommendations for additional surgery on Plaintiff's left knee.  
21 (AR 235.) Dr. Kriegsman's opinions are based upon independent testing  
22 and evaluation. He opined that Plaintiff would be precluded from any  
23 kneeling or squatting, going up or down stairs, ladders, working on an  
24 incline or on uneven ground. (AR 239.)

25 Dr. Kriegsman evaluated Plaintiff's pain as ranging from slight

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27 <sup>1</sup> While Plaintiff identifies the issue in this case as whether  
28 proper consideration was given to the opinions of examining  
physicians, it appears that Dr. Kriegsman was Plaintiff's treating  
physician.

1 to moderate/severe on a daily basis. He indicated that Plaintiff  
2 requires pain medication on a daily basis for her knee problems. (Id.)<sup>2</sup>  
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4 **2. Dr. Donahue:**

5 Dr. Donahue, an Agreed Medical Examiner ("AME"), performed an  
6 orthopedic evaluation on May 24, 1995. (AR 351-369.) There is no  
7 discussion in the ALJ's decision of Dr. Donahue's report or  
8 conclusions. He found that Plaintiff would be restricted to what he  
9 characterized as light work, but with physical requirements identified  
10 as a minimal amount of physical effort. (AR 368.)

11 He identified Plaintiff's pain as occurring occasionally in her  
12 cervical spine with occasional radiation into the right arm and  
13 shoulder; intermittently frequent in the right shoulder with radiation  
14 into the right side of the cervical spine and right arm, accompanied  
15 by a loss of range of motion during overhead reaching; intermittent  
16 frequent pain in the lumbar spine which is relieved by medication, but  
17 radiates into the left posterior thigh and is made worse by prolonged  
18 standing, walking, sitting, and stationary positioning; and constant  
19 slight pain in Plaintiff's right knee which becomes moderate with  
20 prolonged standing and walking, and occasional giving way of the right  
21 knee. (AR 367.)  
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23 **3. Dr. Fedder:**

24 Dr. Fedder, also an AME, performed an examination of Plaintiff on  
25 July 24, 1996. (AR 371-396.) Dr. Fedder reviewed the reports and  
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27 <sup>2</sup> It is apparent from Dr. Kriegsman's report that despite  
28 taking daily pain medication, Plaintiff is not relieved of pain in her  
knee.

1 opinions of Drs. Donahue and Kriegsman. (AR 380-383.) Pertinent to  
2 the Court's consideration are the restrictions described by Dr.  
3 Fedder, which included no prolonged standing or walking, no pivoting  
4 or twisting on either lower extremity; no ascending or descending  
5 stairs or working in squatting or kneeling positions; and to avoid  
6 lifting or carrying of heavy objects. (AR 394.)

7 In his decision, the ALJ makes brief reference to Dr. Fedder's  
8 examination (AR 22), noting the prohibition on pivoting or twisting on  
9 either lower extremity, or working in a squatting or kneeling  
10 position. The ALJ misidentified Dr. Fedder's prohibition on ascending  
11 or descending stairs as a restriction from "frequent" performance of  
12 these activities. (*Id.*) Despite summarizing Dr. Fedder's restrictions  
13 in a substantially correct manner, the ALJ's RFC determination fails  
14 to incorporate any of them, with no explanation for the omission, or  
15 rejection of Dr. Fedder's findings. (AR 25.)

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17 **4. Dr. Karbelnig:**

18 At the hearing in this matter (AR 494-546), the ALJ took  
19 testimony from a medical expert ("ME"), Dr. Karbelnig. (AR 515-525.)  
20 Dr. Karbelnig did not examine Plaintiff, but was limited to his review  
21 of the records. (AR 512.) During questioning by Plaintiff's counsel  
22 (the same counsel who now represents her in this action), the ME  
23 indicated he had reviewed Dr. Fedder's reports, and in particular,  
24 concerning Dr. Fedder's preclusion of "prolonged" standing or walking,  
25 the ME described that term as "ambivalent." (AR 519.) This did not,  
26 however, prevent the ME from "estimating" that Plaintiff could stand  
27 or walk for five or six hours in an eight-hour day. (AR 519.)

1        **B.    Applicable Law.**

2        The ALJ's duty is to analyze all the evidence in the record.  
 3 While a written decision need not specifically discuss every piece of  
 4 evidence, the Court's responsibility is to determine whether the  
 5 decision is based on substantial evidence, and to insure that the ALJ  
 6 did not selectively analyze the evidence. (See Howard ex. rel. Wolff  
 7 v. Barnhart, 341 F.3d 1006, 1012 (9<sup>th</sup> Cir. 2003).)

8        In evaluating the opinion of a treating physician as against that  
 9 of non-treating source, such as an ME, where there is a contradiction,  
 10 and the non-treating source's opinion is not based on independent  
 11 clinical findings, or rests on clinical findings also considered by  
 12 the treating physician, the opinion of the treating physician may be  
 13 rejected only if the ALJ gives specific and legitimate reasons for  
 14 doing so that are based on substantial evidence in the record. See  
 15 Andrews v. Shalala, 53 F.3d 1035, 1041 (9<sup>th</sup> Cir. 1995); see also  
 16 Magallanes v. Bowen, 881 F.2d 747 751, 755 (9<sup>th</sup> Cir. 1989); Ramirez v.  
 17 Shalala, 8 F.3d 1449, 1453 (9<sup>th</sup> Cir. 1993)(applying test where ALJ  
 18 relied on contradictory opinion of non-examining medical advisor).

19        With regard to subjective pain complaints, an adverse credibility  
 20 finding must be based on specific and legitimate conclusions based on  
 21 evidence in the record which is pertinent to credibility. See Fair v.  
 22 Bowen, 885 F.2d 597, 603 (9<sup>th</sup> Cir. 1989); Magallanes, 881 F.2d at 755.  
 23 Such findings must enable the ALJ to "'convincingly justify his  
 24 rejection' of the claimant's excess pain testimony." Stewart v.  
 25 Sullivan, 881 F.2d 740, 743 (9<sup>th</sup> Cir. 1989)(quoting Bellamy v.  
 26 Secretary of Health and Human Services, 755 F.2d 1380, 1382 (9<sup>th</sup> Cir.  
 27 1985).)

1           **C.    Discussion.**

2           The ALJ in this case ignored or failed to adopt as part of his  
3 RFC determination significant postural and functional limitations  
4 which were assessed by treating and examining physicians (which the  
5 Court has summarized in its review of the reports of these  
6 physicians). There is no basis for the Court to review the adequacy  
7 of the ALJ's rejection of these limitations, because no reasons were  
8 given. Particularly striking is the fact that while the ALJ briefly  
9 summarized Dr. Fedder's opinion, he then proceeded to ignore certain  
10 important limitations assessed by Dr. Fedder. Especially in view of  
11 the fact that there is no contradictory medical evidence, the Court  
12 cannot determine why, for example, the ALJ rejected Dr. Fedder's  
13 opinion that Plaintiff was precluded from pivoting or twisting on  
14 either lower extremity, or from working in a squatting or kneeling  
15 position.

16           In the JS, the Commissioner attempts to substantiate the ALJ's  
17 finding that Plaintiff could stand or walk for four hours in an eight-  
18 hour day as not being inconsistent with Dr. Fedder's preclusion from  
19 "prolonged" standing, based upon the ME's testimony that "prolonged"  
20 is an ambivalent term, subject to estimation by a non-examining  
21 doctor. (See JS at 11.) To the contrary, it is fundamental that if a  
22 record is, in a material matter, ambiguous or undeveloped, the ALJ  
23 must develop that record. See Mayes v. Massanari, 276 F.3d 453, at  
24 459-460 (9<sup>th</sup> Cir. 2001).

25           Finally, the Court is most troubled by the ALJ's total omission  
26 of any pain limitations in Plaintiff's RFC. Each of the three doctors  
27 who treated and examined Plaintiff provided specific pain findings,  
28 based on their clinical examinations. The ALJ determined that pain is

1 not a factor in Plaintiff's disability determination, despite  
2 conceding that Plaintiff had "pain in her right shoulder, both knees  
3 and back, impairments that were "severe" within the meaning of the  
4 Regulations..." (AR at 24.) If the ALJ rejected any inclusion of pain  
5 in the RFC analysis based on a credibility determination, the Court  
6 finds that determination to be wholly inadequate. (See Decision at pp.  
7 23-24.) He first questions Plaintiff's credibility that she could not  
8 do any work based upon a 1992 conclusion of a physician that Plaintiff  
9 could do light work. Clearly, this is not an adequate finding.  
10 Second, he further questions Plaintiff's credibility because although  
11 he indicated she had the "capacity and competence"<sup>3</sup> to complete a  
12 vocational rehabilitation course as a medical assistant, "there is no  
13 evidence in the record that she made any effort to pursue this avenue  
14 for return to the work force." (AR 24.) There is no evidence in the  
15 record that equates the physical demands of completion of a vocational  
16 rehabilitation course as a medical assistant with the physical demands  
17 of this work. Moreover, the work of medical assistant was not an  
18 occupation which either the vocational expert or the ALJ concluded  
19 Plaintiff could perform. Rather, the ALJ found that Plaintiff could  
20 work as a photocopy operator or a parking lot attendant.

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27 <sup>3</sup> The Court does not understand the reference to competence  
28 concerning an issue which strictly concerns Plaintiff's physical  
abilities and limitations.

1 For the foregoing reasons, the decision of the Commissioner is  
2 reversed and this matter is remanded for a new hearing consistent with  
3 this Memorandum Opinion.

4 **IT IS SO ORDERED.**

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6 DATED: February 27, 2007

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8 /s/  
9 VICTOR B. KENTON  
UNITED STATES MAGISTRATE JUDGE